The New Rules of Civil Procedure: Writing Reports and being Qualified as an Expert at Trial

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On January 1, 2010, the *Rules of Civil Procedure* were amended in response to the recommendations of the former Associate Chief Justice of Ontario Coulter Osborne at the conclusion of the Civil Justice Reform Project. These amendments have, in part, changed the Rules relating to the form, content and delivery of expert reports and reflect the conclusion that experts were too focused on advocacy rather than upholding their duty to the Court of independence, fairness and objectivity[1]. The goal of the amendments is to institute reforms that will improve access to justice, improve efficiency and reduce delays.

The purpose of this paper is to provide medical and rehabilitation practitioners with an understanding of who the Court considers an expert to be, the criteria for report writing and the Court's expectations of expert witnesses at Trial.

Who is an "expert?"

The admissibility of expert evidence is an exception to the general rule that forbids testimony by witnesses who have no personal knowledge of the facts in issue. Conversely, an expert witness is permitted to testify with respect to inferences or opinions he/she has drawn based on facts that have been proven in the case. In other words, an expert is a witnesses whose purpose is to provide the Judge and/or Jury with necessary ready-made inferences and/or opinions which, due to the technical nature of the facts, they are unable to formulate and which can be taken into consideration when deciding the ultimate issues before the Court[2].

For as long as expert witnesses have been allowed to testify, expert bias has been at the forefront of the Court's concern. As such, in an attempt to balance the Court's recognition that expert evidence "*is of necessity and a mainstay in the litigation process*"[3] with the existence of expert bias, Justice Osborne recommended that experts

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[1] www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/.
[2] *R v. Mohan [1994] S.C.R. 9*
[3] *R. v. Abbey* 2009 ONCA 624, 246 C.C.C. (3d) 301.

be subject to an expressly prescribed overriding duty to the Court when he stated as follows:

> **The issue of "hired guns" and "opinions for sale" was repeatedly identified as a problem during consultations**. To help curb expert bias, there does not appear to be any sound policy reason why the *Rules of Civil Procedure* should not expressly impose on experts an overriding duty to the court, rather than to the parties who pay or instruct them. The primary criticism of such an approach is that, without a clear enforcement mechanism, it may have no significant impact on experts unduly swayed by the parties who retain them.
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> **An expressly prescribed overriding duty to provide the court with a true and complete professional opinion will, at minimum, cause experts to pause and consider the content of their reports and the extent to which their opinions may have been subjected to subtle or overt pressures**[4].

Accordingly, Rule 4.101(1) was added to the *Rules of Civil Procedure* in order to illustrate the principle that an expert owes a duty of impartiality and objectivity to the Court and not to the party that has retained him/her. This duty is described as follows:

> **4.1.01** (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
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> (a) to provide opinion evidence that is fair, objective and non-partisan;
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> (b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
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> (c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.
>
> ***Duty Prevails***
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> (2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

In order to fulfill the criteria of Rule 4.01(1) experts must acknowledge their duty in writing by delivering an Acknowledgement of Expert's Duty form with each report[5]. This requirement reinforces the common law principle that expert evidence must be objective and whose sole purpose is to provide Judge and/or Jury with impartial and unbiased

[4] Supra at note 1.

inferences or opinions that can be used to assist in deciding the ultimate issues in the case and limit expert bias.

Report Writing

A further amendment was made in order to create a common framework for the information that must be included in an expert's report. Rule 53.03(1), (2), (2.1) and (2.2) of the new *Rules* provides as follows:

> **53.03** (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference required under Rule 50, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
>
> (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
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> (2.1) **A report provided for the purposes of subrule (1) or (2) shall contain the following information**:
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> 1. The expert's name, address and area of expertise.
>
> 2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
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> 3. **The instructions provided to the expert in relation to the proceeding**.
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> 4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
>
> 5. **The expert's opinion respecting each issue** and, **where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range**.
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> 6. The expert's reasons for his or her opinion, including,
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> i. a description of the factual assumptions on which the opinion is based,
>
> ii. a description of any research conducted by the expert that led him or her to form the opinion, and

[5] See Appendix "A" for a sample Acknowledgement of Expert's Duty form.

iii. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty signed by the expert. .

While this amendment may appear overwhelming, it is arguable that this framework simply reflects what had already been established by the common law. In *Marchand v. Public General Hospital et al*[6] Mr. Justice Laskin, on behalf of the Court described the substance requirement of the old Rule 53.03(1)[7] as being as follows:

> 38. In our view, these cases indicate that the "substance" requirement of rule 53.03(1) must be determined in light of the purpose of the rule, which is to facilitate orderly trial preparation by providing opposing parties with adequate notice of opinion evidence to be adduced at trial**. Accordingly, an expert report cannot merely state a conclusion. The report must set out the expert's opinion and the basis for that opinion.** Further, while testifying, an expert may explain and amplify what is in his or her report but only on matters that are "latent in" or "touched on" by the report. An expert may not testify about matters that open up a new field not mentioned in the report. The trial judge must be afforded a certain amount of discretion in applying rule 53.03 with a view to ensuring that a party is not unfairly taken by surprise by expert evidence on a point that would not have been anticipated from a reading of an expert's report.

There are two factors within the framework of *Rule* 53 that call for further discussion in order to ensure that expert reports fully comply with the new requirements. Firstly, expert reports must set out "***the instructions provided to the expert in relation to the proceeding****".* In other words, the expert must now disclose what information he/she received from the instructing solicitor even though this information may, at one time, have been considered privileged. This includes the instructions given upon being retained and any further instructions that may follow in any subsequent communications.

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[6] *Marchand v. Public General Hospital et al* (2000) 51 O.R. (3d) 91 (C.A.)

[7] Old Rule 53.03(1) stated: A party who intends to call an expert witness at trial shall, not less than 90 days before the commencement of the trial, serve on every other party to the action a report, signed by the expert, setting out his or her name, address and qualifications and the substance of his or her proposed testimony

Secondly, experts must specifically comment on *"the expert's opinion respecting each issue and, **where there is a range of opinions given**, **a summary of the range and the reasons for the expert's own opinion within that range**".* While the expectation with respect to complying with this Rule have yet to be seen, it is safe to presume that an expert's acknowledgement that he/she has reviewed the opposing expert's reports and there is no change in his/her opinion will no longer be acceptable.

Meet and confer

The requirement that experts give a summary of the range of reasons for their own opinion is linked to the introduction of the Court's power to order opposing experts to "*meet and confer*" in order to clarify disparate interpretations and narrow the issues in dispute. Mr. Justice Osborne's rationale for this addition reflects the opinion that experts were too focused on advocacy rather than upholding their duty to the Court of independence, fairness and objectivity:

> **Expert bias can, I think, best be reduced or somewhat controlled by a "meet and confer" requirement**. In its Supplemental Report, the Discovery Task Force proposed this as a best practice where there are contradictory expert reports. **The authority to require experts to meet and confer exists in other jurisdictions**, including England and Wales, and in Australia under certain circumstances. In Alberta and New Brunswick the court may order experts to meet at the pre-trial stage. British Columbia's Civil Justice Working Group recommended that a case planning conference judge have the authority to order opposing experts **to meet to identify areas of agreement or disagreement and narrow the issues.**
>
> During consultations, medical experts noted that doctors often work well in forming consensus. They suggested that it would be very useful to have experts meet to consider whether issues can be agreed upon and determine which are still in dispute. **For all experts, this reform would provide a level of peer review that expert opinions do not now routinely undergo. It may also assist in clarifying disparate interpretations of underlying facts and assumptions and would introduce a level of accountability that may deter "hired guns**."

As a result, Rules 50.07(1)(c) and 20.05(2) were created. These new Rules state as follows:

> **50.07** (1) **If the proceeding is not settled at the pre-trial conference, the presiding judge or case management master may**,
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> (a) establish a timetable and, subject to the direction of the regional senior judge or a judge designated by him or her, fix a date for the trial or hearing;
>
> (b) in the case of a proceeding governed by Rule 77, order a case conference under rule 77.08 if it is impractical to establish a timetable; and
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> (c) **make such order as the judge or case management master considers necessary or advisable** with respect to the conduct of the proceeding, **including any order under subrule 20.05 (1) or (2).**

Rule 20.05(1) states

> **20.05** (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.
>
> ***Directions and Terms***
>
> (2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,
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> ……..
>
> (k) that any experts engaged by or on behalf of the parties in relation to the action **meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it** if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and;
>
> (i) there is a reasonable prospect for agreement on some or all of the issues, or
>
> (ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

On plain reading Rule 20.05(k) permits a Judge to exercise his/her discretion in ordering opposing experts to meet and confer. This exercise of discretion should be based on a cost benefit analysis, however a Judge may be hard pressed not to order experts to

meet and confer in light of Mr. Justice Moore's comments in *Suwary v. Women's College Hospital*[8] where, in obiter, he criticized the approach taken by the opposing experts in presenting their opinions:

> ... **Had the experts met and discussed this case before trial, that issue would undoubtedly have arisen and a focus could/should have been placed on how to help the court to an understanding of the issue and the medical science pertaining to it**. Drs. McGrath and Davies each practice obstetric medicine in the same hospital in Kingston. Their views on this issue differ and their experience regarding the time needed to deliver a baby at their hospital differed and yet **they chose not to discuss their differences before attending to share them with this court; incredible!**
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> In addition to the WCH records, the experts were provided with transcripts of examination for discovery evidence. Drs. Davies and McGrath struggled to find meaning to the descriptions offered by Dr. Librach in some of the discovery answers he offered regarding his obstetrical decision making processes. Dr. Harman, on the other hand, chose not to read Dr. Librach's discovery testimony at all. This was a stunning admission. **How can an expert hope to help the court to understand whether/how another expert fell below the standard of professional practice, a determination the court can make only after hearing all the available, relevant and admissible evidence, when the expert doesn't bother to consider the evidence and explanation of the colleague in question?**

Giving evidence at trial

There are four criteria that control the admissibility of expert opinion evidence at trial. This criteria is found in the common law and is not impacted by the changes to the *Rules of Civil Procedure.* The four criteria are:

- *The evidence must be relevant to the matters in issue.*
- *The evidence must be necessary in assisting the trier of fact.*
- *The absence of any exclusionary rule; and*
- *The evidence must be presented by a properly qualified expert.*

It is up to the trial Judge to determine whether expert opinion evidence will be admissible. This "gatekeeper" responsibility lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence[9]. Accordingly, before an expert will be allowed to give opinion evidence, the witness will be questioned under

[8] *Suwary v. Women's College Hospital* (2009) CarswellOnt 3626 (Ont.S.C.J.).

oath to ensure that he/she has sufficient specialized knowledge, skill or experience to give the opinion. How the expert has acquired "specialized" knowledge is not limited to education or practical experience alone. It can come from a combination of formal education, private study, scientific study, work experience or other personal observation or involvement with the subject matter[10]. This process is commonly referred to as "qualifying" the witness. It should be noted that once an expert is qualified, this does not mean he/she is qualified to testify at future trials.

In *Song v. Hong*[11], Justice Moore was asked to qualify three witnesses all of whom were qualified, trained and experienced in Ontario however, their expert opinions addressed the future care needs of a person who lives and works in Korea and were informed by hearsay evidence. In ruling whether these witnesses were to be qualified as experts in this particular case, Justice Moore stated as follows:

> Even if these witnesses are determined to be experts in a certain field of human activity, their evidence will be led, to the extent that their opinions are not based on personal knowledge, through hypothetical questions. As such, where the factual basis for the opinion is not within the direct knowledge of the witness or did not come to the witness from another expert in the field in a manner that the court may determine to be reasonably reliable, each witness will be asked to assume the facts necessary to support the opinion or opinions of the expert.
>
> If there is no evidence upon which the assumed fact may be determined by the jury, it may be that the opinion of the expert will not be heard. If, however, the court is satisfied that there is some evidence before the court now or that may come before the court through the evidence of the remaining witnesses at this trial, the court may allow the jury to hear the opinion of the expert.

Given Justice Moore's comments, rehabilitation professionals who are retained to provide opinion evidence would be well advised to ensure that they have consulted with the appropriate treating medical specialists during the preparation of their report. This consultation can be accomplished through meeting with the specialist and/or presenting the report for approval by way of a sign back letter[12].

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[9] *R. v. Abbey* (2009) ONCA 624.
[10] *Tavernese v. Economical Mutual Insurance* 2009 CanLII 28405 (ON S.C.)
[11] *Song v. Hong* [2008] O.J. No.950.
[12] See Appendix B for a sample sign back letter.

Having specialized knowledge alone may not be enough in order to be qualified to testify. The Judge will also consider whether the expert and/or the report bring to the Court an air of bias to one side or the other. The factors taken into account when considering expert bias include[13]:

(1) the nature of the expert's stated expertise or special knowledge;

(2) any statements the expert has made publicly or in publications regarding the prosecution itself [plaintiff or defendant] or evidencing philosophical hostility toward particular subjects;

(3) the expert's history of retainer exclusively or nearly so by the prosecution or the defence;

(4) the expert's long association with one lawyer or party;

(5) the expert's personal involvement or association with a party;

(6) whether a significant percentage of the expert's income is derived from court appearances;

(7) the size of the fee for work performed or a fee contingent on the result in the case;

(8) lack of a report, a grossly incomplete report, modification or withdrawal of a report without reasonable explanation, a report replete with advocacy and argument;

(9) performance in other cases indicating lack of objectivity and impartiality;

(10) a history of successful attacks on the witness's evidence;

(11) unexplained differing opinions on near identical subject matter in various court appearances or reports;

(12) departure from, as opposed to adherence to, any governing ethical guidelines, codes or protocols respecting the expert witness's field of expertise;

(13) inaccessibility prior to trial to the opposing party, follow through on instructions designed to achieve a desired result, shoddy experimental work, persistent failure to recognize other explanations or a range of opinion, lack of disclosure respecting the basis for the opinion or procedures undertaken, operating beyond the field of stated expertise, unstated assumptions, work or searches not performed reasonably related to the issue at hand, unsubstantiated opinions, improperly unqualified statements, unclear or no demarcation between fact and opinion, unauthorized breach of the spirit of a witness exclusion order; and

[13] *United City Properties Ltd. v. Tong* [2010] B.C.J. No. 145.

(14) expressed conclusions or opinions which do not remotely relate to the available factual foundation or prevailing special knowledge.

At the end of the day, it is clear that the amendments flowing from the Civil Justice Reform Project reflect the Court's requirement that experts "***be and appear to be independent of the party and counsel who retained the services of the expert*****" and "*demonstrate objectivity and impartiality in the analysis and opinions that he or she is allowed to give***[14]". Whatever role the expert has undertaken in order to assist counsel in drawing a fuller appreciation of the disputed facts and possible inferences, the expert must set aside this role at trial and remain independent and impartial as "***the court expects nothing more and will accept nothing less***[15]*".*

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[14] *Frazer v. Haukioja* 2008 CanLII 42207 (ON.SC).
[15] Ibid at para 138.